



**Gogo v Gogo (Environment & Land Case E003 of 2021)
[2023] KEELC 17480 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17480 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE E003 OF 2021
GMA ONGONDO, J
MAY 23, 2023
IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION
PURSUANT TO SECTION 38 OF THE LIMITATION OF ACTIONS ACT
AND
IN THE MATTER OF LAND PARCEL NUMBER KASGUNGA/KAMRERI/3337
BETWEEN
OTIENO ERNEST GOGO PLAINTIFF
AND
OBIERO NICHOLAS GOGO DEFENDANT**

JUDGMENT

A. Introduction

1. The instant dispute revolves around the whole of land reference number Kasgunga/Kamreri/3337 measuring approximately Two Decimal Two Five Hectares (2.25 Ha) in area (The suit land herein) contained in Registry Map Sheet number 26 and located within Homa Bay County.
2. The plaintiff is represented by the firm of Veronica Migai and Company Advocates.
3. The defendant is represented by the firm of Madoro Ochieng Khairalla and Company Advocates.
4. On 20th June 2022, pursuant to order 37 rule 19 of the *Civil Procedure Rules, 2010*, the court directed, *inter alia*;

“.... The originating summons dated 9th November 2021 be heard by viva voce evidence as the originating summons is treated as a plaint in this suit.”



5. At paragraphs (h) and 12 of the plaintiff's originating summons dated 9th November 2021 and 15-paragraphed supporting affidavit of even date respectively, Mbita SRM's court civil case number 22 of 2020 (Mbita SRMCC No. 22 of 2020 herein) featured prominently. So, on 14th February 2023, this court called for the original record of the said suit for perusal targeted at a just decision in this case pursuant to sections 1A, 1B, 3 and 3 A of the *Civil Procedure Act* Chapter 21 Laws of Kenya and section 3 of the *Environment and Land Court Act*, 2015 (2011), among other provisions of the law. The record was availed and I have studied the same.

B. The Plaintiff's Case

6. In the originating summons, the plaintiff claims to have acquired the suit land by way of adverse possession for determination of the following issues;
- a. A declaration that the Defendant's right to recover the whole of the suit land is barred under the *Limitation of Actions Act*, Chapter 22 Laws of Kenya and his title thereto extinguished on the grounds that the plaintiff herein has openly, peaceful and continuously been in possession and use for a period exceeding Forty Years (40) years.
 - b. There be an order that the Plaintiff be registered as the proprietor of the whole of the suit land.
 - c. The defendant herein be ordered and/or directed to execute and/or sign all the necessary transfer instruments to facilitate transfer and registration of the suit property in the joint names of the Plaintiff and the Defendant herein, and in default the Deputy Registrar of this Honourable Court be at liberty to execute the transfer instruments in favour of parties (both the Plaintiff and the Defendant).
 - d. There be an order restraining the Defendant either by himself, agents, servants and/or employees from interfering with the plaintiff's peaceful possession, enjoyment, cultivation and occupation of the suit land in any manner whatsoever and howsoever.
 - e. That upon granting prayers 1,2,3 and 4 above, the Honourable court be pleased to grant stay of proceedings in Mbita Civil Case No. 22 of 2020 pending the hearing and determination of this suit.
 - f. The costs of this originating summons to be borne by the defendant.
 - g. Such other or further orders as the Court may deem fit and just to grant in the circumstances.
7. The originating summons is premised upon the plaintiff's supporting affidavit and grounds (a) to (p) stated on the face of it. Briefly, the plaintiff's lamentation is that he is the son of Clement Gogo Ojuki (Deceased) who was the original owner of the suit land. That the deceased died in the year 1996. That there had been no subsisting issue over the suit land until the year 2018 when the plaintiff discovered that the defendant had fraudulently registered the same exclusively in his name. That the plaintiff was born and raised on the suit land which he has notoriously, peacefully and continuously possessed and occupied for over forty years hence, acquired it by prescription.
8. On 7th November 2022, the plaintiff (PW1) relied on his statement dated 22nd November 2021 and supporting affidavit sworn on 9th November 2021 as part of his evidence. He testified, inter alia, that the suit land where he was born and raised, is registered in the name of his younger brother, the defendant herein. That he cultivates the suit land but the defendant intends to evict him from the same. Further, he relied on title deed of the suit land as contained in the plaintiff's list of documents dated



9th November 2021 (PExhibit 1) and his further list of documents dated 30th October 2022 (PExhibit 2) herein.

9. In the submissions dated 17th November 2022, learned counsel for the plaintiff referred to the originating summons, set out a summary of the plaintiff's case and stated that the defendant sought eviction relief in Mbita SRMCC No. 22 of 2020. Counsel identified two issues for determination namely whether the plaintiff is entitled to the suit land by adverse possession and whether he is entitled to the prayers in the originating summons. Counsel analyzed the issues in the affirmative and relied on the case of *Maliamu Ncurubi M'Ibiri v Francis M'Imanyara M'Ringer* (2011) KLR AND *Mbira v Gachuhi* (2002) 1 EA, to fortify the submissions.

c. The Defendant's Case

10. The defendant was duly served as discerned in affidavits of service sworn on 19th January 2022, 10th June 2022 and 24th September 2022 filed herein on 25th January 2022, 20th June 2022 and 17th October 2022 respectively.
11. Interestingly, the defendant neither filed any response to the originating summons nor testified in this suit.
12. Besides, the defendant's counsel, filed submissions dated 17th January 2023 terming the plaintiff's claim herein dishonest, dishonorable, brought in bad faith, frivolous, vexatious and an abuse of the court process. That the plaintiff approached this court with unclean hands thus, his claim cannot hold and must be dismissed with costs. Counsel cited section 7 of the *Civil Procedure Act* Chapter 21 Laws of Kenya and submitted that this suit is barred by *Res Judicata* Doctrine by dint of Mbita SRMCC No. 22 of 2020. Further, counsel cited, *inter alia*, *Karia and Another v The Attorney General and others* (2005) eKLR, *Uhuru Highway Development Ltd v Central Bank of Kenya* (1999) eKLR and *Bridges v Mees* (1957) Ch 475, to buttress the submissions.

D. Issues for Discussion

13. I have duly considered the entire originating summons the evidence of PW1 and the parties' respective submissions. In this regard, the issues for determination in this suit are condensed to whether the plaintiff has established to the requisite standards that he has acquired ownership of the suit land by adverse possession.
14. For clarity, in the case of *Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshwein and another* (2015) eKLR the Court of Appeal noted that adverse possession dictates that;
 - a. The piece of land in question must be registered in the name of a person other than the applicant,
 - b. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, and
 - c. The applicant must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.

E. Discussion and Disposal

15. It is noteworthy that the plaintiff's claim is for the whole of the suit land and the area thereof is as pointed out at paragraph 1 hereinabove. It is thus, a defined portion of land as shown in PExhibits 1 and 2; see also *Gatimu Kinguru v Muya Gathangi* (1976-80) 1 KLR 317.



16. On the first dictate, grounds (g) and (i) of the originating summons, paragraphs 8 and 9 of the plaintiff's supporting affidavit and statement show that the suit land is registered in the name of the defendant. Also, PW1 testified in part;

“The suit land is registered in the name of the defendant who is my younger brother ...”

17. Indeed, PExhibit 1 is the same as PExhibit 2. It is an affirmation that the suit land is registered in the name of the defendant with effect from 1st September 2008.

18. On the other hand, the defendant did not deny in his submissions that the suit land is registered in his name. That resolves the first dictate accordingly.

19. As regards the second dictate, it is well settled that possession can take different forms including fencing and cultivation of land in question; see *Kimani Ruchine and Another v Swift Rutherford Company Ltd and Another* (1976-80) 1 KLR 1500 applied in *Titus Ong'anga Nyachico v Martin Okioma Nyauma and 3 others* 2017 eKLR.

20. Moreover, I echo the observation in *Kinguru case* (supra) that;

“...The defendant's possession was open and notorious ... There has been no discontinuation of possession by the plaintiff since 1959...There was ouster of the plaintiff from the land followed by adverse possession, occupation, development and cultivation ...”

21. In the present suit, the plaintiff demonstrated that he has met the second dictate as per grounds (c) (e) and (g) (k) and (l) as well as paragraphs 5, 6, 7 and 10 of his affidavit in support of the originating summons. Further, his statement reads thus;

“.....I did establish my home thereon and since then I have enjoyed open, notorious, peaceful and uninterrupted enjoyment of the suit property herein from 1992 to date.

I have constantly planted maize, beans, vegetables and other on the suit property.....”.

22. Concerning the third dictate, I take note of grounds (m), (n) and (o) of the originating summons and the plaintiff's evidence inclusive of his supporting affidavit and statement. The possession and occupation of the suit land by PW1 is inconsistent with the title of the registered proprietor, the defendant who has ceased to possess the same; see *Halsbury's Laws of England* 3rd Edition Volume 24 paragraphs 481 and 482 at pages 251 and 252 on dispossession as enjoyment and use of the land in dispute is not possible.

23. It must be noted that the original record in Mbita SRMCC No. 22 of 2020 reveals that on 2nd November 2022, the plaintiff who is defendant herein prayed for withdrawal of the suit. Accordingly, the same was marked as withdrawn with no orders as to costs. Therefore, relief number 5 sought in the originating summons is overtaken by events hence, disallowed in this suit.

24. In *Black's Law Dictionary* 10th Edition at page 1504 “Res Judicata” means an issue that has been definitively settled by judicial decision and it's three essential elements are;

- a. An earlier decision on the issue,
- b. A final judgment on merits, and
- c. The involvement of the same parties or parties in privity with the parties.



25. To this end, there is no spirited opposition to the plaintiff's claim embodied in the originating summons. The defendant's submissions dwelt mainly on *Res Judicata* principle which has not been attained herein as Mbita SRMCC No. 22 of 2020 was withdrawn and there is lack of essential elements as captured in section 7 of the [Civil Procedure Act](#), [Uburu Highway Development case](#) and [Black's Law Dictionary](#) (all *supra*).
26. I find that the plaintiff has proved his claim against the defendant on a balance of probabilities as noted in the case of *Salim v Boyd* (1971) EA 550. Thus, he is entitled to only orders (a) (b) (c) (d) and (f) sought in the originating summons. The restraint order granted as per prayer 4 of the originating summons, in the circumstances, is a permanent injunction as provided for under section 13 (7) (a) of the [Environment and Land Act](#), 2015, (2011).
27. Wherefore, judgment be and is hereby entered for the plaintiff against the defendant in terms of orders (a) (b) (c) (d) and (f) as stated in paragraph 6 hereinabove.
28. It is so ordered.

DELIVERED AND DATED AT HOMABAY THIS 23RD MAY 2023

G. M. A ONG'ONDO

JUDGE

:PRESENT:

a. Terrence, court assistant.

